

**Master Transmission Rebuilders, Inc. and Frank M. Muscari Sr. Case 31-CA-11315**

8 March 1984

# **SUPPLEMENTAL DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 20 October 1983 Administrative Law Judge Joan Wieder issued the attached supplemental decision. The General Counsel filed limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions but not to adopt the recommended Supplemental Order.

In his limited exceptions, the General Counsel seeks only to correct a mathematical error contained in the recommended Supplemental Order. As pointed out by the exceptions, and confirmed by our examination of the backpay specification, the administrative law judge inadvertently ordered double reimbursement of discriminatee's recoverable travel expenses. We shall modify the Supplemental Order to eliminate this double recovery.

## **ORDER**

The National Labor Relations Board orders that the Respondent, Master Transmission Rebuilders, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall forthwith pay to Frank M. Muscari Sr. the sum of \$5,723.20 net backpay plus \$642.60 for reimbursable expenses, with interest, computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977),<sup>1</sup> less tax withholdings required by Federal and state laws.

<sup>1</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The specification of earnings by calendar quarter set forth in the backpay specification shall be used for purposes of interest calculations.

## **SUPPLEMENTAL DECISION**

### **STATEMENT OF THE CASE**

JOAN WIEDER, Administrative Law Judge. This supplemental proceeding is derivative from a decision of Administrative Law Judge Jay R. Pollack issued February 26, 1982, which found that Respondent, Master Transmission Rebuilders, Inc., wrongfully discharged Frank M. Muscari, Sr. because he engaged in activities protected by Section 7 of the Act in violation of Section 8(a)(1) of the National Labor Relations Act, as amended. The Respondent was ordered to offer Muscari full and

immediate reinstatement to his former position of employment or, if that position no longer existed, to a substantially equivalent position, with full seniority, privileges, and benefits previously enjoyed and to make him whole for any loss of pay he may have suffered as a result of the discrimination against him, plus interest. On March 30, 1982, the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, adopted the findings and conclusions of Administrative Law Judge Pollack since no statement of exceptions was filed.

On November 18, 1982, the Regional Director for Region 31 issued a backpay specification and notice of hearing alleging that a controversy had arisen over the amount of backpay due under the terms of the Administrative Law Judge's order as adopted by the Board. On December 8, 1982, the Respondent filed an answer specifically admitting the allegations contained in the specification regarding gross backpay and denied those portions of the specification containing allegations as to interim earnings. The pleadings having framed the issues, the Regional Director for Region 31 issued an order setting the matter for hearing. A hearing was held on September 13, 1983, at Las Vegas, Nevada.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file posthearing briefs. Only counsel for the General Counsel filed a posthearing brief.

At the commencement of hearing, the Respondent sought to introduce evidence relative to the specifications regarding gross backpay despite its prior admission as to their accuracy. The Respondent was afforded the opportunity to explain the failure to comply with Section 102.52(b) and (c)<sup>1</sup> of the Board's Rules and Regulations at the hearing. The backpay specification was issued on November 18, 1982, and the Respondent's answer admitting gross backpay as stated therein is dated December 7, 1982. The Respondent asserted that the actual gross

<sup>1</sup> Sec. 102.54 of the Board's Rules and Regulations, provides, in pertinent part, as follows:

(b) . . . the respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegations, and the respondent shall be precluded from introducing any evidence controverting said allegation.

earnings were not determined until the morning of the hearing. No basis for the Respondent's failure to examine the Company's earnings records for Muscari prior to hearing was offered. At a pretrial telephone conference held the day before the hearing, the Respondent asserted that the gross backpay was not in issue. The Respondent did not offer any basis adequate to explain the failure to comply with Section 102.54(b) of the Board's Rules and Regulations. Thus the allegations as to gross backpay are accepted as true and accurate. See Section 102.35(h) of the Board's Rules and Regulations. See also *Normike Contractors*, 267 NLRB 836 (1983), and *Sumco Mfg.*, 267 NLRB 253 (1983).

On October 9, 1981, the Respondent filed a petition for reorganization under Chapter 11 of the Bankruptcy Code of 1978, U.S.C. § 101, et seq., in the United States Bankruptcy Court, District of Nevada. During the above-described prehearing telephone conference, counsel for the Respondent indicated that he petitioned the Bankruptcy Court for removal of this proceeding. Review of the Bankruptcy Code, particularly Section 362(b)(4),<sup>2</sup> discloses that the Bankruptcy Code does not stay a Board backpay proceeding which is "an action by a governmental unit to enforce its regulatory powers." See *NLRB v. Adams Delivery Service*, 623 F.2d 96 (9th Cir. 1980); *Bel Air Chateau Hospital*, 611 F.2d 1248 (9th Cir. 1979); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981).<sup>3</sup> Therefore, the issue of interim earnings will be considered based on the evidence of record.

On the entire record, including the arguments, and my observation of the demeanor of the witnesses and the brief of counsel for General Counsel, I make the following

#### I. FINDINGS AND CONCLUSIONS

The gross backpay figure submitted by counsel for the General Counsel in the specifications was not properly placed in issue, as found above. The Respondent has the burden of establishing appropriate reductions to the gross backpay figure by use of such factors as interim earnings. *Dodson's Market v. NLRB*, 553 F.2d 617 (9th Cir. 1977); *Flite Chief, Inc.*, 258 NLRB 1124 (1981).

The only witness was Muscari, the discriminatee, who was called by the Respondent. Muscari was found to be a candid witness who testified sincerely, attempting to clearly recall events and to be responsive to the various questions posed by both counsel for the Respondent and counsel for the General Counsel. His demeanor was forthright and cooperative. His testimony is found to be highly credible. It is uncontroverted that he was terminated on April 6, 1982, sought employment at 8 to 10

companies shortly thereafter, and within 10 days of his termination started working for Hust Brothers (Hust). Based on these factors, I find that Muscari made a reasonably diligent search for employment in "an honest and good faith effort" to mitigate his loss of income. *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). The Respondent had not placed into evidence any information indicating, no less proving, willful idleness or loss of earnings by Muscari. See *NLRB v. Miami Coca-Cola Co.*, 360 F.2d 569 (5th Cir. 1966), and *Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223 (5th Cir. 1973).

Muscari's income at Hust Brothers was substantially lower than that which he earned at the Respondent. He started working for Hust at a rate of \$220 a week, gross pay. When asked by the Respondent if the figures contained in the backpay specification reflected raises, he stated that the increased earnings were attributable to overtime required by his employer. While employment at Hust Brothers was not at approximately the same level of pay as received from Master Transmission Rebuilders, I find that the relevant evidence still supports a finding that the Respondent failed to sustain its burden of proving lack of due diligence in seeking interim employment or willful loss of earnings on the part of Muscari. Even while working at Hust Brothers, Muscari continued to look for higher paying work, talking to a company called Lakeshore in an attempt to procure employment as a salesman and seeking employment at Diversified Equipment and Batt (ph.) Rentals as a parts manager. Muscari noted that he took the job with Hust because he had a pregnant wife, had to pay the doctor bills, procure insurance to cover the birth, he already had a child, and his family had to eat. Muscari, being aware of his family responsibilities and anxious to find work to meet these responsibilities as well as to mitigate his losses, accepted lower paying work, an action justifiable under the circumstances of this case and which constitutes a good-faith effort in seeking interim employment. There was no evidence adduced indicating that Muscari could have secured employment that paid as much or more than he was earning at the Respondent. See *Big Three Industrial Gas Co.*, 263 NLRB 1189 (1982).

The General Counsel contends in its brief that the overtime hours which led to Muscari's increased earnings while employed by Hust should be excluded from interim earnings and the interim earnings in the backpay specification should be amended by a reduction to correspond with the record evidence that Muscari earned only \$220 a week straight time wages. Citing *Southeastern Envelope Co.*, 246 NLRB 423 (1979); *United Aircraft Corp.*, 204 NLRB 1068 (1973). *Southwestern Envelope Co.*, supra at 424 fn. 10, states that in *United Aircraft Corp.*, supra, the Board held that overtime on an interim job is excludable from interim earnings as a collateral benefit. As noted by Administrative Law Judge Anne F. Schlesinger in the *United Aircraft Corp.* decision, *ibid.*, at 1073:

Therefore, as supplemental earnings from a "moonlighting" job constitute an exception to the rule that interim earnings are deductible from gross backpay, supplemental earnings from "excess overtime" on an interim job should likewise constitute an excep-

<sup>2</sup> Sec. 362(b)(4) of the Bankruptcy Code provides:

The filing of a petition under Section 301, 302, or 303 of this Title does not operate as a stay under Section (a)(1) of this Section, of the commencement of continuation of an action or proceeding by governmental unit to enforce its regulatory powers.

<sup>3</sup> The Respondent admitted that the Bankruptcy Court would not stay the proceeding when counsel for the Respondent stated:

I also want to advise the court that it would be the Bankruptcy Court's position to not hear this matter. I have talked to the Judge; so, even though this matter has been removed to the Bankruptcy Court, the Judge would automatically remand it. So, I think we can safely ignore the removal that is on file in this proceedings.

tion. Earnings from such extra effort, whether exerted on "excess overtime" or a "moonlighting" job, should operate to the advantage of the backpay claimant, not to the employer required to make him whole for a discriminatory discharge.

In the instant proceeding there was no testimony detailing what was encompassed in the gross backpay figures submitted in the backpay specification. The record fails to indicate that the earnings contained in the specification were based on a 40-hour workweek and, therefore, there is no basis for finding that the overtime earned during Muscari's employment by Hust was "excess" or different from the types of earnings he could have reasonably been expected to earn if he remained employed by Master Transmission Rebuilders. This record contains no predicate for finding excess "overtime." The issue of "excess overtime" was not raised until after the close of record and, therefore, there was no opportunity for the Respondent's counsel to address the matter, including the manner in which gross earnings were calculated and whether such calculations took into account any overtime earnings. The General Counsel's request to amend the specification by eliminating overtime earnings is not justified by the evidence of record and is denied.

By letter dated October 5, 1983, and received October 11, 1983, well after the date set for filing briefs, counsel for the Respondent filed a letter responding to the General Counsel's motion to reduce interim earnings in the backpay specification to \$220 per week of straight time wages. The letter was sent solely to oppose this motion and was considered in this limited light.

Finally, the record clearly discloses that Muscari lived for the past 8 years at a residence located one-half mile away from the Respondent and had to commute 14 miles each way to his job at Hust Brothers. As noted by counsel for the General Counsel, expenses incurred in commuting to and from interim employment by private automobile in excess of the miles commuted to and from the Respondent's facility are reimbursable at the rate of 10 cents a mile, which in this case is 13.5 miles or \$13.50 a

week. See *Mid-America Machinery Co.*, 258 NLRB 316, 318 (1981), and *Electrical Workers IBEW Local 410 (Stone & Webster Engineering)*, 266 NLRB 870 (1983). These expenses will be added to the amount of money the Respondent is directed to pay Muscari for the backpay period from the date he obtained employment at Hust to the end of the backpay period, the week of March 5, 1982. The dates that Muscari worked overtime will be included in this tallying of expenses since this was a cost incurred in order to mitigate backpay and is consonant with meeting this responsibility.

## II. SPECIFICATION OF AWARD

Based on the General Counsel's backpay specification, Frank M. Muscari is due total net backpay of \$6,365.80 and reimbursement of travel expenses incurred in going to and from interim employment of \$642.60.

On the basis of the foregoing and pursuant to Section 10(c) of the Act, it is recommended that the Board issue the following<sup>4</sup>

## ORDER

It is hereby ordered that the Respondent, Master Transmission Rebuilders, Inc., its successors or assigns, shall forthwith pay to Frank M. Muscari Sr. \$6,365.80 net backpay plus \$642.60 for reimbursable expenses, plus interest, computed in the manner set forth in the *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980),<sup>5</sup> less tax withholding required by Federal and state laws.

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>5</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The specification of earnings by calendar quarter as set forth in the General Counsel's backpay specification shall be used for purposes of interest calculation.